

D.P.U. 91-273

Petition of Taunton Municipal Lighting Plant for approval by the Department of Public Utilities, pursuant to G.L. c. 164, § 56D, of an Electricity Purchase Agreement between Taunton Municipal Lighting Plant and the Silver City Energy Limited Partnership.

D.P.U. 92-273

Petition of Taunton Municipal Lighting Plant for approval of its 1991 long-range forecast of electricity requirements and resources.

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D.P.U. 91-273/92-273

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ORDER ON APPEAL BY MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP OF
HEARING OFFICER RULING
DENYING LATE-FILED PETITION TO INTERVENE

I. INTRODUCTION

The above captioned proceeding involves two petitions of the Taunton Municipal Lighting Plant ("TMLP"). TMLP filed the first, a petition for Department of Public Utilities ("Department") approval of its Long Range Forecast of Electricity Needs and Requirements ("forecast/supply plan"), on May 13, 1991, with the former Energy Facilities Siting Council ("EFSC" or "Siting Council"). This case was docketed EFSC 91-51. TMLP updated its petition on December 20, 1991. On May 27, 1992, the Siting Council issued a Notice of Adjudication that set July 6, 1992 as the intervention deadline. After the merger of the Department and the Siting Council, this case was re-docketed as D.P.U. 92-273.

TMLP filed the second petition, for approval of a power purchase agreement with Silver City Energy Limited Partnership ("SCE"), with the Department on November 27, 1991. The Department docketed this case as D.P.U. 91-273. The Department issued information requests in January 1992. On February 1, 1993, the Department issued an Order of Notice that set February 16, 1993 as the intervention deadline.

By Order of March 30, 1993, the Department consolidated these proceedings. Order on Motion for Stay and Consolidation of Proceedings, D.P.U. 91-273 and D.P.U. 92-273 (1993). The Order consolidating the proceedings provided that intervenors in the forecast proceeding would have the same status for the contract portion of the case and vice versa.

By Hearing Officer Memoranda, the hearing officer set the following procedural schedule: May 12, 1993--deadline for filing briefs on the standard of review to be applied in the contract

portion of the consolidated proceeding; September 24, 1993--deadline for identification of witnesses and topics they would discuss during forecast/supply plan hearings; October 1, 1993--deadline for issuing discovery and for submittal of pre-filed testimony on the forecast/supply plan; and October 20-22, 1993--dates for forecast/supply plan hearings. By Hearing Officer Memorandum, the deadline for pre-filed testimony on the forecast/supply plan was extended to October 8, 1993. The Hearing Officer granted TMLP's motion to delay the forecast/supply plan hearings by a ruling issued October 18, 1993. Hearings on the demand forecast and a portion of the supply plan were held on November 18-19, 1993.

On November 15, 1993, MASSPIRG filed a petition to intervene in the consolidated proceeding. In support of its petition, MASSPIRG asserted that: (1) a number of its members are ratepayers of TMLP; (2) its interest in just and reasonable electric rates and in reliable, least-cost electrical service with a minimum environmental impact will be substantially and directly affected by the outcome of this proceeding; (3) its experience as an intervenor in other proceedings demonstrated an interest in balancing environmental and cost concerns not represented by other parties; (4) its expertise would aid the Department's consideration of the case; and (5) intervention in this proceeding may be necessary to preserve its rights with respect to issues raised in Silver City Energy Limited Partnership, EFSB 91-100 ("Silver City").¹ MASSPIRG alleged that the EFSB decision in Eastern Energy Corporation, EFSB 90-100R (1993) ("Eastern Decision") raised the need to preserve its rights in Silver City because the

¹ EFSB 91-100 is a proceeding at the Energy Facilities Siting Board ("EFSB") pertaining to the siting of the power plant proposed by SCE.

decision conditioned a finding of need on the filing of approved contracts.²

MASSPIRG also stated that it might seek to conduct discovery, cross-examination, sponsor expert testimony, and file legal briefs and necessary memoranda. MASSPIRG stated that it would not seek to modify the current hearing schedule.³

On November 19, 1993, the hearing officer issued a Hearing Officer Ruling ("Ruling") denying MASSPIRG's late-filed petition to intervene because MASSPIRG failed to: (1) explain how its interests were unique and could not be adequately represented by the timely intervenors, the Attorney General of the Commonwealth of Massachusetts ("Attorney General") and COAL FACTS, a Taunton citizens group; (2) explain why its petition was late-filed; and (3) demonstrate how its interest outweighed the Department's need to conduct the proceeding in a complete, efficient, and orderly fashion. Taunton Municipal Lighting Plant, D.P.U. 91-273/92-273, Hearing Officer's Ruling on MASSPIRG's Late-filed Petition to Intervene, at 6 (November 19, 1993).

On November 24, 1993, the Massachusetts Public Interest Research Group

² The condition in the Eastern Decision is as follows:

Here, in light of the need for the proposed project beginning in the year 2000, the Siting Board finds that submission of (1) signed and approved PPAs which include capacity payments for at least 75 percent of the proposed project's electric output, and (2) signed PPAs which include capacity payments with Massachusetts customers for at least 25 percent of the proposed project's electric output which is the result of a competitive resource solicitation process beginning in 1993 or beyond and which is approved pursuant to G.L. c. 164, § 94A, will be sufficient evidence to establish that the proposed project will provide a necessary energy supply for the Commonwealth. EEC must satisfy this condition within four years from the date of this conditional approval.

³ TMLP and SCE filed oppositions to the petition on November 17, 1993. Other parties to the proceeding, the Attorney General for the Commonwealth of Massachusetts ("Attorney General") and COAL-FACTS, a Taunton citizens group, did not file oppositions to the petition to intervene.

("MASSPIRG") filed an appeal ("Appeal") with the Commission of the Ruling denying the late-filed petition of MASSPIRG to intervene.

On December 2, 1993, TMLP filed a response ("TMLP Response") and SCE filed an opposition ("SCE Opposition to Appeal") to the Appeal. Neither the Attorney General nor COAL-FACTS filed responses by the December 7, 1993 deadline for responses to the Appeal.

II. STANDARD OF REVIEW

The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. § 1.03 (1)(b); see also G.L. c. 30A, § 10. The Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45, cert. denied, 439 U.S. 921 (1978) ("Boston Edison").

In ruling on petitions to intervene, the Department must balance the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion. See New England Telephone and Telegraph Company, D.P.U. 89-300, at 5 (1990) ("NET"). When presented with a late-filed petition to intervene, the Department also considers: (1) the extent of the delay; (2) the effect of the late participation on the ongoing proceeding; and (3) the explanation for the tardiness. Western Massachusetts Electric Company, D.P.U. 92-8C-A, Order on Appeal by Massachusetts Municipal Wholesale Electric Company of Hearing Officer Ruling Denying Late Petition to Intervene, at 5 (June 25, 1993) ("WMECo").

The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03 (1) (e); Boston Edison, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. Boston Edison, 375 Mass. at 45.

III. POSITIONS OF THE PARTIES

A. MASSPIRG

In its Appeal, MASSPIRG argues that its petition to intervene should be allowed (Appeal at 6). Generally, MASSPIRG reiterates arguments made in the initial petition, but provides specific support for its arguments not provided in the original petition. First, MASSPIRG argues that the Eastern Decision is a reason for granting the late-filed petition to intervene (id. at 2-3). MASSPIRG states that the conditional approval in the Eastern Decision effectively removes the determination of need for power from siting cases to utility forecast/supply plan and contract cases (id. at 3). MASSPIRG argues that despite reliance in prior Siting Council decisions on signed and approved contracts as prima facie evidence of need, the Eastern Decision increases the importance of forecast/supply plan and contract cases (id.). MASSPIRG states that before the Eastern Decision, it had reason to believe that defeating a proposal in a siting proceeding would sufficiently protect its interests, and that the existence of the SCE contract with TMLP for 20 percent of the proposed plant's output was of "little importance, at least as a litigation priority" (id.). MASSPIRG states that application of a similar condition in the Siting Board's decision

regarding Silver City would make each contract approval far more critical since a developer may have additional time to secure approval of contracts following a siting decision (id.).

Second, with respect to its proposed participation in the case, MASSPIRG clarifies its initial petition by explaining that it attempted to preserve its rights to undertake certain activities if the current procedural schedule changes for other reasons (id. at 4). MASSPIRG emphasizes that it has "no intention of seeking any modification of the current schedule to accommodate the lateness of its petition" (id.). MASSPIRG asserts that even if its participation would add to the complexity of the proceeding, the benefits of its participation in developing a record and in protecting its asserted interests far outweigh what it terms "administrative inconvenience" (id.).

Third, the Appeal addresses for the first time how MASSPIRG's interests are distinguished from those of the Attorney General and COAL-FACTS. MASSPIRG states that it is a statewide organization and therefore the local organization, COAL-FACTS, does not represent its interests (id. at 1).⁴ In addition, MASSPIRG distinguishes its interest in the proceedings from those of the Attorney General by noting the following: (1) as an elected official the Attorney General's priorities are subject to change and MASSPIRG has no assurance that a future Attorney General will share its views in briefing issues in the case; (2) the Attorney General represents all ratepayers whereas MASSPIRG represents residential ratepayers and its student members; (3) the Attorney General sometimes takes a position different from that of MASSPIRG; and (4) MASSPIRG has information on alternatives to the proposed supply plan and contract which it believes is important

⁴ MASSPIRG also argues that the fact that COAL-FACTS is not represented by an experienced practitioner is further evidence that COAL-FACTS cannot adequately represent its interests.

to include and which the Attorney General had previously not discovered or planned to include (id. at 1-2).

Finally, MASSPIRG argues on appeal that it had no opportunity to present oral argument in support of its petition and that the initial petition contained the "exact same specificity" regarding MASSPIRG's interest in the proceeding as other petitions previously filed with and accepted by the Department (id. at 1). MASSPIRG states that the Department has not given notice that the intervention standard has changed (id.).

B. TMLP

In response to the Appeal, TMLP argues that MASSPIRG failed to address the deficiencies that led to the denial of the late-filed petition (TMLP Response at 2-4). TMLP contends that the adequacy of the representation of COAL-FACTS is irrelevant to a determination of whether MASSPIRG has interests which are specifically and substantially affected by the proceedings (id. at 2). TMLP further contends that MASSPIRG has failed to demonstrate how its members' general interests outweigh the Department's and the parties' substantial interest in conducting efficient and orderly proceedings (id. at 3). TMLP argues that MASSPIRG has not shown the relevance to the proceeding of any interests it may have which differ from those of the Attorney General (id.).

TMLP asserts that the Eastern Decision is no excuse for the late petition and that MASSPIRG could have protected itself by filing a timely petition (id. at 4). TMLP states that MASSPIRG made a strategic decision not to intervene and that the Department would seriously compromise its standards for the orderly conduct of proceedings by accepting the Eastern

Decision as an excuse for the late-filed petition (id. at 4-5).

C. SCE

In opposition to MASSPIRG's Appeal, SCE asserts that the arguments raised in the Appeal are not different from those raised in the petition, addressed by parties in opposition to the petition, and fully considered in the Hearing Officer's Ruling (SCE Opposition to Appeal at 1). SCE argues that the Ruling does not constitute an error of law warranting the granting of MASSPIRG's Appeal (id. at 2).

IV. ANALYSIS AND FINDINGS

In evaluating late-filed petitions to intervene, the Department considers the extent of and reason for delay in filing a petition to intervene, and the effect of the late participation on the ongoing proceeding. See WMECo at 5. With respect to the extent of the delay, MASSPIRG filed its petition nine months after the deadline in the contract portion of the case and 15 months after the deadline in the forecast/supply plan portion of the case. The Department finds, therefore, that the extent of the delay is significant.

With respect to the reason for the delay, MASSPIRG's failure to explain the delay in its petition to intervene left the hearing officer with no choice but to reject the petition under the standard for late-filed petitions. Contrary to MASSPIRG's assertion, the Hearing Officer's Ruling did not apply a new standard, but rather applied the established standard for late-filed petitions as outlined in the WMECo Order.⁵ See Taunton Municipal Lighting Plant, D.P.U. 91-273/92-273,

⁵ MASSPIRG states that its petition spelled out its interests with the same level of specificity as prior petitions granted by the Department. While the same petition may well have been granted if timely filed, a late-filed petition must at least address its lateness.
(continued...)

Hearing Officer's Ruling on MASSPIRG's Late-filed Petition to Intervene, at 4-5 (November 19, 1993).

In its Appeal, MASSPIRG attempts to explain the delay, and also explains how its interest in the proceeding outweighs the Department's need to conduct the proceeding in a complete, efficient, and orderly fashion. We do not agree with MASSPIRG's assertions. First, MASSPIRG's assertion that the Eastern Decision is, in effect, a changed circumstance is without merit. As noted in the Hearing Officer's Ruling, the Siting Council viewed signed and approved power purchase contracts as prima facie evidence of need as early as 1987. See Northeast Energy Associates, 16 DOMSC 335, 358 (1987). As a party to the Silver City case at the Siting Council, MASSPIRG was fully aware that TMLP had a forecast/supply plan before the Siting Council and that its contract with Silver City Energy Limited Partnership would be filed with the Department.⁶ MASSPIRG participated in a hearing in the Silver City case on November 15, 1991 which involved discussion of these two issues (Silver City Energy, EFSB 91-100, November 15, 1991 Motion Hearing, Tr. at 8-22). Further, MASSPIRG was present when the EFSB hearing officer ruled that the TMLP forecast and supply plan would not be reviewed as part of the Silver City case (id. at 18-19). MASSPIRG states in its Appeal that, at the time, the contract was "of little importance, as a litigation priority" (Appeal at 3). The internal priority assigned to a proceeding by a petitioner has no bearing on the merits of a petition to intervene.

⁵(...continued)

⁶ Even if MASSPIRG were unaware of the contract case through its participation in Silver City, its participation in Newbay Corporation, D.P.U. 88-265 provided constructive notice since the Department coordinated briefing schedules in the two cases.

Second, the bases MASSPIRG provides for distinguishing its interests from those of the Attorney General and COAL-FACTS are inadequate. MASSPIRG argues on the one hand that COAL-FACTS represents local interests distinct from its interests as a statewide organization and argues on the other hand that the Attorney General's representation of statewide interests is distinct from MASSPIRG's representation of residential ratepayers. In attempting to distinguish its interests from those of the Attorney General, MASSPIRG points to factors which have existed throughout the case and which would seem to have made intervention imperative at the time of the intervention deadlines (i.e., the elective nature of the Attorney General's office, the potential for the Attorney General to take a position opposed to MASSPIRG's, the intent to present evidence the Attorney General did not plan to include). In Eastern Energy, the hearing officer denied a late-filed petition where the petitioner failed to explain how its interests were any less separate or distinct, or how it was any less able to present probative evidence at the intervention deadline two and one half years earlier than at the time of the late-filed petition. See Eastern Energy Corporation, EFSB 90-100R, Procedural Order, October 27, 1992, at 6. Here, the Department finds that MASSPIRG's explanation similarly fails to justify the lateness of the petition.

Third, MASSPIRG argues that the benefit of its participation and protection of its interests outweigh "administrative inconvenience." We do not agree with MASSPIRG. MASSPIRG has not sufficiently addressed how its entry into the proceeding after discovery and prefiled testimony deadlines, and after the completion of demand forecast and partial supply plan hearings will elucidate the proceeding. Further, as described above, MASSPIRG has not

established that its interests cannot be adequately represented by other parties. The Department finds that its interest in conducting the proceeding in an orderly fashion outweighs the interests of MASSPIRG.

Finally, MASSPIRG raises on appeal that it had no opportunity for oral argument in support of its petition. There is no requirement that an opportunity for oral argument be given. It is within the discretion of the hearing officer to grant an opportunity for oral argument. 220 C.M.R. § 1.06(6); see also Attorney General v. Department of Public Utilities, 390 Mass. 208, 216-17 (1983) (no need to hold hearing on motion to intervene). The hearing officer issued her Ruling based on MASSPIRG's written petition to intervene and the written oppositions filed by TMLP and SCE.

Under the standard set forth in WMECo, and for the reasons set forth above, the Department affirms the hearing officer Ruling denying MASSPIRG's petition to intervene.

V. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the appeal of the Massachusetts Public Interest Group from the Hearing Officer's Ruling denying the petition of the Massachusetts Public Interest Group to intervene in this proceeding be and hereby is DENIED.

By Order of the Department,